

These are the tentative rulings for civil law and motion matters set for Thursday, October 16, 2014, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, October 15, 2014. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: Effective July 1, 2014, all telephone appearances will be governed by Local Rule 20.8. More information is available at the court's website, www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0058970 Wilson, Diana vs. Gagni, Joly

The motion to set aside default judgment is continued, on the court's own motion, to October 30, 2014 at 8:30 a.m. in Department 43 to be heard by the Honorable Michael W. Jones.

2. M-CV-0060032 Bamberg, Jason vs. Gyori, Jeremy, et al

The motion to compel is dropped from the calendar at the request of the moving party.

3. M-CV-0061810 Capital One Bank USA, N.A. vs. Travis, Len

Defendant's motion to set aside default is continued to November 6, 2014 at 8:30 a.m. in Department 40. Defendant is requested to provide the court with an endorsed filed copy of the moving papers. The court apologizes to the parties for any inconvenience.

4. S-CV-0022800 Martinez-Senftner Law Firm, et al vs. Alcaraz, Lilia G.

The motion to tax costs is continued, on the court's own motion, to October 30, 2014 at 8:30 a.m. in Department 40 to be heard in conjunction with the pending motion to tax costs.

5. S-CV-0026760 Yanez, Michael vs. Union Pacific Railroad Co., et al

This tentative ruling is issued by the Honorable Garen J. Horst. If oral argument is requested, such argument shall be heard on Wednesday, October 29, 2014 at 8:30 a.m. in Department 41:

Defendant Union Pacific Railroad's (UPRR's) Demurrer to the Second Amended Complaint (SAC) is sustained. A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (CCP§430.10(e).) A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) As such, the allegations in the pleadings are deemed to be true no matter how improbable the allegations may seem. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) The SAC is reviewed keeping these principles in mind.

UPRR challenges the sufficiency of the first and fifth causes of action. The first cause of action alleges wrongful discharge in violation of public policy, which is also referred to as a *Tameny* claim. (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 178.) Such an action exists where the duty at stake "inures to the benefit of the public at large rather than to a particular employer or employee." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 669.) There are five elements that must be established in a *Tameny* action: (1) the existence of an employer-employee relationship; (2) the employee was subject to an adverse employment action; (3) this action was in violation of public policy; (4) there is a nexus between public policy and the adverse employment action; and (5) damages. (*Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 641.) Upon review of the SAC, there are insufficient facts alleged to establish a violation of public policy.

A violation of public policy exists where the violation (1) is embodied in a constitutional provision, statute, or administrative regulation; (2) is beneficial to the public; and (3) involves a fundamental, substantial, and well-established public policy. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1256.) Upon review of the five statutory provisions identified by plaintiff in the SAC, the factual allegations do not sufficiently establish the five identified statutes have either a beneficial public interest or that they involve public policy. Thus, the first cause of action fails.

As to the fifth cause of action for injunctive relief/UCL violations, the SAC does not sufficiently redress the deficiencies identified by the court in its ruling on the motion for judgment on the pleadings. A review of the SAC and FAC shows that the allegations are nearly identical with no substantive changes. The fifth cause of action clearly fails since plaintiff has taken no steps to amend the deficiencies previously identified by the court.

The final area to address is whether plaintiff should be afforded leave to amend. The trial court has discretion to sustain a demurrer with or without leave to amend.

(*Martin v. Bridgeport Community Association, Inc.* (2009) 173 Cal.App.4th 1024, 1031.) Plaintiff bears the burden of demonstrating how the complaint may be amended to cure the defects therein. (*Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302.) A demurrer will be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists that the defects can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The court notes that plaintiff has been afforded three opportunities to sufficiently plead a *Tameny* claim against UPRR. However, upon review of plaintiff's opposition, he has made a minimally sufficient showing to demonstrate the possibility to cure the defects in the first cause of action with an amendment. Therefore, plaintiff is afforded an opportunity to attempt to redress the deficiencies in the first cause of action and the demurrer is sustained with leave to amend as to the *Tameny* claim.

The same is not true for the fifth cause of action. As previously stated, the SAC provides a near word for word recitation of the allegations made in the FAC. Furthermore, plaintiff provides no substantive argument in his opposition challenging UPRR's demurrer to the fifth cause of action. The failure to oppose a demurrer may be construed as having abandoned the claims. (*Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1, 20.) Since plaintiff has not remedied the deficiencies in the fifth cause of action and plaintiff has made no showing that the deficiencies may be remedied with an amendment, the demurrer to the fifth cause of action is sustained without leave to amend.

The third amended complaint shall be filed and served on or before October 17, 2014.

6. S-CV-0028016 Gewalt, John vs. The Estate of Charles D. Gewalt

Wesley C.J. Ehler's Motion to be Relieved as Counsel for plaintiffs is granted and he shall be relieved as counsel of record effective upon the filing of the proof of service of the signed order upon plaintiffs.

7. S-CV-0030314 Belisle, David, et al vs. Centex Homes, et al

The motion for leave to file first amended cross-complaint is continued, on the court's own motion, to October 23, 2014 at 8:30 a.m. in Department 42 to be heard by the Honorable Charles D. Wachob.

8. S-CV-0030424 Saladin, Jeffrey vs. Sanders, Trevor, et al

Defendant/Cross-Defendant Sacramento A-1 Door's unopposed motion for good faith settlement is granted. Based on the standards set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling tortfeasor's proportionate shares of liability for plaintiff's injuries and therefore is in good faith within the meaning of CCP§877.6.

9. S-CV-0032724 Kandris, Thomas P., et al vs. Gyori, Jeremy, et al

Cross-Defendant's unopposed Motion for Summary Judgment is granted. The trial court shall grant a motion for summary judgment if "all the papers submitted show that there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law." (CCP§437c(c).) A party to the action may also move for summary adjudication if that party contends there is no merit to one or more of the causes of action. (CCP§437c(f)(1).) However, a motion for summary adjudication shall only be granted where it completely disposes of a cause of action. (*Ibid.*) In reviewing a motion for summary judgment, the trial court must view the supporting evidence, and inferences reasonably drawn from such evidence, in the light most favorable to the opposing party. (*Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 843.) In this instance, cross-complainant has not established a triable issue of material fact in support of any of the causes of action in the cross-complaint. The underlying action arose from contract between Thomas Kandris and cross-complainant in the amount of \$610,000.00. (Cross-defendants' SSUMF Nos. 1, 2, 10, 11, 27.) Mr. Kandris paid cross-complainant \$712,135.60 for work on the project. (*Id.* at Nos. 2, 13, 28.) He also paid an additional \$53,673.13 to subcontractors that cross-complainant failed to pay. (*Id.* at Nos. 3, 14, 29.) There were no change orders in the contract. (*Id.* at No. 21.) The contract also did not include an exculpatory clause. (*Id.* at Nos. 26, 41.) Nor does the contract include an indemnity provision. (*Id.* at No. 42.) Since there is no dispute as to these material facts, summary judgment in favor of cross-defendants is warranted.

10. S-CV-0032934 Amsbaugh, Brian, et al vs. Kaiser Permanente, et al

Defendant's Motion to Quash Notice of Taking Video Testimony of Jone Korovata is granted. Plaintiffs' notice for the video testimony of Jone Korovata set for September 19, 2014 is quashed.

In light of the court's ruling on the motion to quash, the motion to compel is dropped from the calendar as moot.

11. S-CV-0033002 Scott, Harold, et al vs. Ford Motor Company

Defendant's Motion to Compel Vehicle Inspection is granted. Plaintiffs shall make their vehicle available for inspection on or before October 24, 2014. Plaintiffs' counsel is sanctioned \$1,200.00.

12. S-CV-0033144 Butler, Timothy Ivan vs. Ford Motor Company

The motion to compel deposition is dropped from the calendar at the request of the moving party.

///

13. S-CV-0034160 Baeseman, Jennifer vs. Kahn & Comings, Inc., et al

The motion to compel is dropped from the calendar as no moving papers were filed with the court.

14. S-CV-0034296 U.S. Bank, N.A. vs. NNN Parkway Corporate Plaza, LLC

Cross-Defendants' Cassidy Turley California and Cassidy Turley Northern California's Demurrer to First Amended Cross-Complaint

Cross-Defendants U.S. Bank and CWC Capital Asset Management's Joinder to the Demurrer

Cross-defendants U.S. Bank and CWC Capital Asset Management both filed joinders to the current demurrer based upon the suspended corporate status of several cross-complainant corporate entities. The court notes that the challenges to the corporate status of cross-complainants NNN Parkway Plaza 10, LLC; NNN Parkway Plaza 14, LLC; NNN Parkway Plaza 15, LLC; NNN Parkway Plaza 21, LLC; and NNN Parkway Plaza 27, LLC are not appropriate in a demurrer. The court, on its own motion, sets an OSC re Motion to Strike so the aforementioned cross-complainants may show cause why they should not be stricken from the first amended cross-complaint due to their suspended corporation statuses. The OSC hearing is set for November 13, 2014 at 8:30 a.m. in Department 40.

Ruling on Request for Judicial Notice

Cross-Defendants' request for judicial notice is granted as to Exhibit A and the original cross-complaint. The general request for judicial notice of "[a]ny pleadings or records in the file" is denied.

Cross-Complainant's request for judicial notice is denied.

Ruling on Demurrer

A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (CCP§430.10(e).) A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) As such, the allegations in the pleadings are deemed to be true no matter how improbable the allegations may seem. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

The fifth (breach of contract); seventeenth (breach of fiduciary duty); eighteenth (constructive fraud); nineteenth (fraud and deceit in violation of Civil C§§1572, 1709, and 1710); twentieth (tortious interference with contract), twenty-first (UCL violations); and twenty-second (accounting) causes of action fail since the first amended cross-

complainant has omitted inconsistent material factual allegations. However, these inconsistent allegations are still read into the pleading, are treated as a sham, and are disregarded. (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384; *Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1061; see *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 12-13; see also *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1109.) Since a review of the pleadings does not lend itself to an amendment and cross-complainant does not sufficiently establish an ability to amend these causes of action, the demurrer is sustained without leave to amend.

Cross-Defendant U.S. Bank's Demurrer to the First Amended Cross-Complaint

Ruling on Request for Judicial Notice

Cross-Defendants' request for judicial notice is granted as to Exhibit A and the original cross-complaint. The general request for judicial notice of "[a]ny pleadings or records in the file" is denied.

Cross-Complainant's request for judicial notice is denied.

Ruling on Demurrer

A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (CCP§430.10(e).) A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) As such, the allegations in the pleadings are deemed to be true no matter how improbable the allegations may seem. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) Upon review of the first amended cross-complaint and when the pleading is read as a whole, it alleges sufficient facts to support the challenged causes of action.

Cross-defendant shall file and serve its answer or general denial on or before October 24, 2014.

Cross-Defendant CWC Capital Management's Demurrer to the First Amended Cross-Complaint

Ruling on Request for Judicial Notice

Cross-Defendants' request for judicial notice is granted as to Exhibit A and the original cross-complaint. The general request for judicial notice of "[a]ny pleadings or records in the file" is denied.

Cross-Complainant's request for judicial notice is denied.

///

Ruling on Demurrer

A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (CCP§430.10(e).) A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) As such, the allegations in the pleadings are deemed to be true no matter how improbable the allegations may seem. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) Upon review of the first amended cross-complaint and when the pleading is read as a whole, it alleges sufficient facts to support the challenged causes of action.

Cross-defendant shall file and serve its answer or general denial on or before October 24, 2014.

15. S-CV-0034302 Schmitz, Michie Anne vs. Central Mortgage Co., et al

Defendants' unopposed Motion to Dismiss the Sixth Cause of Action and Strike Portions of the Verified Complaint is granted.

16. S-CV-0034482 Wagner, Robert D. vs. Seterus, Inc., et al

Plaintiff's OSC re Application for Preliminary Injunction is denied.

Defendants' request for judicial notice is granted pursuant to Evid C§452.

The court may grant a preliminary injunction when it appears from the complaint that the plaintiff is entitled to the demanded relief and the plaintiff would suffer irreparable injury if the enjoined action were allowed to proceed. (CCP§526(a).) A foreclosure sale may be enjoined under the same elements applicable for other requests for injunctive relief, namely after a (1) balancing of the hardships of the parties and (2) a showing by the plaintiff of a reasonable probability of prevailing on the merits. (*Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust* (1985) 168 Cal.App.3d 818, 824; *Robbins v. Superior Court* (1985) 38 Cal.3d 199.) The plaintiff has the burden of showing he/she would be harmed if the preliminary injunction were not granted. (*Casmalia Resources, Ltd. v. County of Santa Barbara* (1987) 195 Cal.App.3d 827, 838.)

As to the initial analysis of hardship upon plaintiff, he claims the ultimate loss of his home and lack of other arrangements. (Wagner declaration ¶¶8-10.) The harm to defendants is the loss of the opportunity to proceed with the foreclosure sale along with the loss of immediate use of any proceeds from the sale. The hardships in this instance tip in favor of plaintiff.

However, plaintiff has not sufficiently met his burden as to the second part of the analysis. Specifically, plaintiff must show a reasonable probability that he will prevail on

the merits of his action. Plaintiff's action alleges wrongful foreclosure based upon defendants' engaging in dual tracking. However, the submitted evidence does not support plaintiff's allegations. Plaintiff was offered a trial loan modification and successfully made the payments. (Fry declaration ¶¶13-16.) He was then offered a permanent modification. (Id. at ¶¶16-17.) However, plaintiff never responded to the offer for permanent modification of his loan. (Id. at ¶¶18-20.) Plaintiff acknowledged he did not accept the permanent modification because he did not wish to extend the life of the loan. (Id. at ¶20.) Based upon this, plaintiff has not sufficiently established that he will prevail on any of his causes of action.

The application for preliminary injunction is denied and the temporary restraining order is dissolved forthwith.

17. S-CV-0034862 Crosby, Darwin vs. Save Mart Supermarkets, Inc.

The demurrer to the second amended complaint is continued, on the court's own motion, to November 6, 2014 at 8:30 a.m. in Department 42 to be heard by the Honorable Charles D. Wachob.

18. S-CV-0034948 Huppe, Chris vs. Jensen Corporate Holdings, Inc., et al

Defendants' Demurrer to the First Amended Complaint is overruled. A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (CCP§430.10(e).) A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) As such, the allegations in the pleadings are deemed to be true no matter how improbable the allegations may seem. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) Upon reviewing the FAC and reading the pleading as a whole, it alleges sufficient factual allegations to support the second, third, and fifth causes of action against the respectively named defendants.

Defendants shall file and serve their answer or general denial on or before **October 24, 2014**.

19. S-CV-0034970 Acosta, Lloyd vs. Top96, Inc., et al

Defendant's Motion to Stay Proceedings is granted and the current action is stayed. An OSC re Status of Stay is set for February 24, 2015 at 11:00 a.m. in Department 40. The November 18, 2014 case management conference is vacated.

///

The appearances of the parties are required on the petition for approval of transfer of structured settlement.

These are the tentative rulings for civil law and motion matters set for Thursday, October 16, 2014, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, October 15, 2014. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.